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BADAN PENGURUSAN BERSAMA GURNEY PARAGON RESIDENTIAL v. HUNZA PROPERTIES (GURNEY) SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
B [CIVIL SUIT NO: PA-22NCVC-247-12-2017]
18 SEPTEMBER 2024

Abstract – *(i) In a mixed development with different types of parcels - residential parcels and commercial parcels - the one development-one account argument does not result in a just outcome. For the one development-one account argument - which necessarily means that there can only be one chargeable rate - to be just and reasonable, in relation to the Strata Management Act 2013, and fair and justifiable, these things must take place, inter alia: (a) the general meetings - where the decisions relating to the whole development are made - must be attended by all parcel owners (residential and commercial) so that they can all vote on the resolutions, which constitute binding decisions; and (b) if all parcel owners (residential and commercial) are not given the right to vote, the general meeting would have no power to decide on the one rate chargeable for all parcels: residential and commercial; (ii) It is not just and reasonable to impose maintenance charges and sinking fund contributions which apply only to the residential parcels, and are determined only by the residential parcels owners, through the joint management body on the developer and the owner of the commercial component common property.*

LAND LAW: *Management corporation – Mixed development – Maintenance and management of – Common property – Resolutions passed at annual general meeting for separation of building maintenance and sinking fund accounts into residential component and commercial component – Whether resolutions binding – Whether developer entitled to impose different rates for different types of parcels – Whether just and reasonable for commercial parcel owners to be charged same rate as residential parcel owners – Whether one development-one account would result in just outcome – Whether general meeting with all parcel owners in attendance ought to be held to determine valid chargeable rate – Building and Common Property (Maintenance and Management) Act 2007 – Strata Management Act 2013*

The plaintiff was the residential joint management body of a development called Gurney Paragon, of which the first defendant ('D1') was the developer and the second defendant ('D2') was the original owner of the land on which the development was built. Gurney Paragon was a stratified mixed development and had two distinct components – the residential component

('condominiums') and the commercial component (the mall, the office tower and the heritage structure St Joseph's). From June 2011 to November 2013, vacant possession of the condominiums was delivered to the purchasers. In October 2014, at the first annual general meeting ('first AGM') of the Gurney Paragon serviced condominiums, the plaintiff was formed under the Building and Common Property (Maintenance and Management) Act 2007 ('BCPA'). The plaintiff's duty and function was to maintain and manage the building or land intended for subdivision into parcels and the common property. At the first AGM, certain resolutions were passed, *inter alia*, to establish a separate building maintenance fund to strictly and exclusively manage the residential apartments comprised of the Gurney Paragon serviced condominiums and for the management of the common property and common facilities belonging to and enjoyed by the owners/residents of the Gurney Paragon serviced condominiums and for the owners of the commercial component to set up their own respective separate building maintenance fund, to manage and maintain the commercial component independently from the Gurney Paragon serviced condominiums. More than two years after the first AGM, in January 2017, the plaintiff issued a letter to the Commissioner of Buildings ('COB'), asserting that, (i) D1 failed to deliver to the plaintiff the approved building plans (for subdivision), the draft strata plans, the schedule of parcels, and the register of parcel owners; and (ii) failed to pay the maintenance and management charges into the plaintiff's building management fund and failed to contribute to the sinking fund, according to ss. 12 and 15 of the Strata Management Act 2013 ('SMA'). The plaintiff effectively claimed for RM56.93 million, which consisted of the charges to be paid into the building maintenance fund and the contributions to the sinking fund. D1 denied the plaintiff's allegations and asked the COB to deliver its administrative decisions and directives concerning this dispute. D1 further wrote to the plaintiff to state that the plaintiff's demands revealed that the plaintiff was seeking a 'monetary contribution' that was contrary to the resolutions that the plaintiff itself passed at the first AGM, which made their demand legally and ethically unjustifiable. The COB made an administrative decision that the plaintiff was to maintain and manage the condominiums separately from the commercial components of the mall, the office tower and the St Joseph's and that the plaintiff was to collect the building maintenance fund charges and the sinking fund contributions only from the condominiums (residential owners) as the commercial component was to be maintained and managed separately by its owner instead. The plaintiff filed this suit to claim that the developer and the commercial component owner pay the maintenance and sinking fund charges into the residential component's building maintenance account and sinking fund account. The plaintiff also sought an order that the developer and commercial component owner deliver possession of the commercial component's common property to the plaintiff, for the plaintiff to maintain

and manage. The issues that arose were (i) whether the first and second defendants were liable to pay maintenance charges into the building maintenance account and to pay sinking fund contributions into the sinking fund account; and (ii) which party was to manage the common properties delineated in yellow in the strata plan.

Held (dismissing plaintiff's claim against first to third defendants):

(1) In a mixed development, with different types of parcels – residential parcels and commercial parcels – the developer is entitled to impose different rates for the different types of parcels. The chargeable rate to maintain and manage common facilities which are for the exclusive 'benefit and enjoyment' of the residential parcel owners, should not be the same as the rate chargeable for the commercial parcel owners, who do not have the right to use such exclusive facilities that are only for the residential parcel owners. The formula to determine the different chargeable rates must 'represent a fair and justifiable proportion of the expenses for the maintenance and management of the common property.' (para 57)

(2) It was not 'just and reasonable' nor was it 'fair and justifiable' for the plaintiff to charge the first and second defendants the same rates or charges that residential parcel owners pay into the plaintiff's building maintenance account and sinking fund account. The second defendant, as the commercial parcel owner did not (and does not) get to use the common facilities that were exclusive to the residential parcels such as the swimming pool and the gym. Nor did the second defendant get the benefit of the expenses incurred by the plaintiff for the residential parcels, such as general repair and maintenance. The plaintiff also did not pay any money towards the maintenance and management of the common property of the commercial component, which was managed by the second defendant. (paras 59-63)

(3) The first and second defendants were never asked by the plaintiff to vote on the resolutions passed at the plaintiff's general meetings; on pertinent resolutions such as the resolutions on the rate chargeable for the maintenance and management of the common properties in Gurney Paragon. Section 22(2)(g) of the SMA provides that the second defendant, as the owner of the unsold parcels in Gurney Paragon, had the same voting rights as any purchaser, exercisable in a general meeting. At the first AGM, it was not the second defendant who caused, or was responsible for, the passing of the resolutions passed. The second defendant did not attend the first AGM as a commercial parcel owner and did not vote. It was only the residential parcel owners who voted and passed the resolutions and so, the residential parcel owners and the plaintiff were bound by the resolutions. (paras 64-71)

(4) The first AGM resolutions were affirmed at the second AGM. No subsequent resolutions passed at subsequent AGMs invalidated the first AGM resolutions. In the AGMs after the first AGM, the budgets presented by the plaintiff disclosed expenses solely for the residential component (condominiums). There was no budget for any provision to maintain and manage the commercial component. The fact demonstrated that the plaintiff had not only accepted but in fact endorsed the separation of the building maintenance and sinking fund accounts into the residential component and the commercial component. Further, the plaintiff's expenses were limited only to the residential parcels. The plaintiff's audited accounts did not disclose any expenses for the commercial component (paras 72-76)

(5) Section 16(5) of the BCPA provides that the COB is empowered to resolve disputes about the building maintenance account 'as he deems fit and just.' The COB had decided (i) the maintenance of the condominiums (residential parcels) was separate from the commercial parcels; and (ii) the plaintiff was to collect maintenance charges for the residential parcels only; the commercial parcels were to be maintained and managed by their owner, namely the second defendant. The COB's decision was based on the resolutions, as the resolutions were unanimously passed. The resolutions provided that the management, collection and expenditure of the residential component, which necessarily included the building maintenance account money – were to be separate from the commercial component. As the BCPA empowered the COB to resolve disputes about the building maintenance account, and his decision was not set aside, the COB's decision was thus binding on the plaintiff. (paras 81-87)

(6) The plaintiff's one development-one account argument did not result in a just outcome. Gurney Paragon was a mixed development. For the one development-one account argument – which necessarily meant that there could only be one chargeable rate – to be just and reasonable, in relation to the SMA, and fair and justifiable in relation to the SPAs between the first and second defendants and the purchasers, these three things must take place: (i) the general meetings – where the plaintiff asserted that decisions relating to the whole Gurney Paragon development were made – must be attended by all parcel owners (residential and commercial) so that they could all vote on the resolutions, which constitute binding decisions; (ii) if all parcel owners (residential and commercial) were not given the right to vote, the general meeting would have no power to decide on the one rate chargeable for all parcels: residential and commercial; and (iii) also, the AGMs would not have been in compliance with the SMA, and the decisions made at the AGMs would be rendered void. Herein, no valid AGM was held by the plaintiff,

because the second defendant, as the commercial parcel owner, was not given the right to attend the AGMs as a parcel owner, with a right to vote. To determine a valid chargeable rate, a general meeting with all the parcel owners in attendance, including the second defendant, must be held. Until a valid rate is determined, no charges were due and owing from the first and second defendants. The first and second defendants were not liable to pay the plaintiff the RM56.93 million claimed (paras 88, 91 & 94)

(7) The second defendant (as the commercial component owner) was to continue to maintain and manage its own commercial component common property. The maintenance and management of the commercial component's common property were to remain *status quo*. This court was bound to interpret the BCPA and the SMA as social legislations which were not rigid but flexible, to bring about what was 'just and reasonable' and 'fair and justifiable' which compelled this court to allow separate maintenance and sinking fund accounts for the residential component as against the commercial component. (paras 95-98)

Case(s) referred to:

Aikbee Timbers Sdn Bhd & Anor v. Yii Sing Chiu & Anor And Another Appeal [2024] 3 CLJ 177 CA ***(foll)***

Badan Pengurusan Bersama Tropicana 218 Macalister v. Tropicana Macalister Avenue (Penang) Sdn Bhd [2023] CLJUO 17; [2023] 1 LNSO 17 CA ***(refd)***

Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation [2019] 2 CLJ 592 CA ***(refd)***

Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor [2019] 10 CLJ 547 CA ***(refd)***

Tropicana Macalister Avenue (Penang) Sdn Bhd v. Badan Pengurusan Bersama Tropicana 218 Macalister [2022] CLJU 2945; [2022] 1 LNS 2945 HC ***(refd)***

Tropicana Macalister Avenue (Penang) Sdn Bhd v. Badan Pengurusan Bersama Tropicana 218 Macalister [2023] CLJU 1554 HC ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, ss. 2, 10(3)(b), 12(2), 16(1), (2), (5), 17(1), 18, 44, 45

Strata Management Act 2013, ss. 2, 10(1), 11(1), 12, 15, 21(1)(a), 22(2)(g), 148, 149

For the plaintiff - Lai Chee Hoe & Ooi Xin Yi; M/s Chee Hoe & Assocs
For the 1st, 2nd & 3rd defendants - Ashok Kumar & Lim Chin Lun; M/s Skrine
For the 4th defendant - Charanjit Singh Mahinder Singh; SLA

Reported by Suhainah Wahiduddin

JUDGMENT

Kenneth St James JC:

Prelusion

[1] The subject development project is a mixed development. It has both residential and commercial components (parcels).

[2] At the first annual general meeting (AGM) of the development, the joint management body for the residential component (JMB) was formed, and resolutions were passed for the JMB to open a building maintenance account and a sinking fund account for the residential component of the development. The money paid into these accounts was exclusively for the maintenance and management of the residential component's common property and facilities.

[3] It was also resolved at the first AGM that the commercial component will have a separate maintenance account for the maintenance and management of the commercial component's common property.

[4] The JMB files this suit to claim that the developer and the commercial component owner pay the maintenance and sinking fund charges into the residential component's building maintenance account and sinking fund account. The arrears amount to more than RM56 million. The JMB also seeks an order that the developer and commercial component owner deliver possession of the commercial component's common property to the JMB for the JMB to maintain and manage.

[5] Should the JMB's claims be allowed?

Preliminaries

[6] This case was a part-heard trial that I took over after four days of trial had passed. I took over the trial on its fifth day. I heard the trial for another two days. So there were a total of six days of trial.

[7] I will refer to the plaintiff: the Gurney Paragon Residential Joint Management Body as "P"; the first defendant: Hunza Properties (Gurney) Sdn Bhd as "D1"; the second defendant: Hunza Properties (Penang) Sdn Bhd as "D2"; the third defendant: Beachfront Services Sdn Bhd as "D3"; and the fourth defendant: the Director of Lands and Mines of Penang as "D4".

[8] I will refer to D1 and D2 together as "D1D2"; and D1, D2 and D3 together as "D1D2D3".

[9] P eventually called three witnesses. I was informed that P initially had six more witnesses. But at a narrowing-the-issues-for-trial session conducted by the previous presiding judge, which took place after four days of trial there was a partial resolution to the dispute concerning D1 rectifying

certain defects in the Gurney Paragon development (Gurney Paragon). As there was no longer any issue relating to defects rectification, P did not call these six other witnesses. The defendants called two witnesses.

The Plaintiff's Claims

[10] P is the residential joint management body. D1 is the developer of Gurney Paragon. D2 is the original owner of the land on which the development was built. D3 is D2's wholly owned subsidiary, which operates and manages the car park and valet parking business on the commercial component of Gurney Paragon. D4 is the Director of Lands and Mines of Penang, who approves the subdivision of buildings and lands.

[11] P claims against D1D2 for:

(i) alleged outstanding maintenance charges and sinking fund contributions of RM56,930,645.52 (the RM56.93 million);

(ii) the return of the common property of the commercial component of Gurney Paragon to P (which I will allude to below); and

(iii) the rectification of certain defects in the fire protection and electrical services facilities.

[12] P claims against D3 for:

(i) D3 to account for the revenue from its car park and valet parking business operated on the commercial component of Gurney Paragon; and

(ii) D3 to pay over to P all the monies collected from D3's car park and valet parking business.

[13] P's claim against D4 is for D4 to approve the strata plan for Gurney Paragon, or if the strata plan is already approved, to vary it according to the terms of this court's judgment relating to the strata plan.

The Pertinent Facts Proved By The Documentary Evidence

[14] Gurney Paragon is a stratified mixed development. Gurney Paragon has two distinct components – the residential component (the condominiums) and the commercial component (the mall: also known as Parcel 1; the office tower: also known as Parcel 2; and the heritage structure called St. Joseph's: also known as Parcel 3).

[15] In the 2½ years from June 2011 to November 2013, vacant possession of the condominiums was delivered to the purchasers.

[16] About a year later in October 2014 (on 14 October 2014), at the first annual general meeting (first AGM) of the "Gurney Paragon serviced condominium", P was formed under the Building and Common Property (Maintenance and Management) Act 2007 (BCPA). By its very name, P is the

Gurney Paragon Residential Joint Management Body (Badan Pengurusan Bersama Gurney Paragon Residential). P's duty (and function) is to "maintain and manage the building or land intended for subdivision into parcels and the common property" – citing s. 21(1)(a) of the Strata Management Act 2013 (SMA).

[17] D1 is the developer. D2 is the original owner of the land on which Gurney Paragon was developed. D2 is also the present owner of the commercial component, which consists of the mall, the office tower, and the St. Joseph's heritage structure.

[18] At the first AGM, certain resolutions were passed (decisions were made), including these resolutions:

(i) under Agenda 1: the Gurney Paragon joint management body *ie*, P, was named the "Gurney Paragon Residential Joint Management Body";

(ii) under Agenda 2: to establish "a separate building maintenance fund" to "strictly and exclusively" manage "the residential apartments" comprised of the "Gurney Paragon Service[d] Condominiums", and for "the management of the common property and common facilities belonging to and enjoyed by the owners/residents" of the Gurney Paragon Serviced Condominiums;

(iii) under Agenda 3: the building maintenance fund is to be managed by a committee "to be elected only from the owners/purchasers of the Gurney Paragon Serviced Condominiums"; and

(iv) under Agenda 4: the owners of the commercial component (the mall, the office tower and St. Joseph's) will set up "their own respective separate building maintenance fund, to manage and maintain the commercial component "independently from" the Gurney Paragon Serviced Condominiums.

[19] The second to seventh AGMs were held on 12 February 2015, 13 May 2017, 5 August 2018, 26 October 2019, 12 December 2020 and 11 December 2021. At these AGMs which were held after the first AGM, these resolutions were never invalidated, superseded or even varied. As such, the resolutions passed by P in the first AGM stood and remained valid.

[20] More than two years after the first AGM, in January 2017, (on 3 January 2017), P issued a letter, through its solicitors, to the Commissioner of Buildings (COB) asserting that:

(i) D1 failed to deliver to P the approved building plans (for subdivision), the draft strata plans, the schedule of parcels, and the register of parcel owners; and

(ii) failed to pay the maintenance and management charges into P's building management fund and failed to contribute to the sinking fund, according to ss. 12 and 15 of the SMA.

[21] P effectively claims the RM56.93 million, which consists of the charges to be paid into the building maintenance fund and the contributions to the sinking fund.

[22] In March 2017 (on 6 March 2017), D1 denied P's allegations and asked the COB to deliver "its administrative decisions and directives" concerning this dispute to D1 and P.

[23] On the next day (7 March 2017), D1 wrote again to P's solicitors to state that P's demands reveal that P was seeking a "monetary contribution" that is "contrary to the resolutions" that P itself passed at the first AGM, which makes their demand "legally and ethically unjustifiable".

[24] By a letter of 7 April 2017, the COB made reference to the minutes of the first AGM and the resolutions passed in the first AGM and made an administrative decision that P is to maintain and manage the condominiums separately from the commercial components of the mall, the office tower and St Joseph's. The COB elaborated that what this means is that P is to collect the building maintenance fund charges and the sinking fund contributions only from the condominium (residential) owners. The commercial component is to be maintained and managed separately by its owner instead.

[25] On 10 September 2020, D4 approved the Gurney Paragon final strata plans. These strata plans were served on P on 24 September 2020. The strata plans were later amended to rectify minor typographical errors. The amended (updated) final strata plans were filed and served on P on 1 June 2021.

Applicable Statutes

[26] The statutes that are pertinent to consider for this judgment are the following statutes:

(i) the BCPA, which came into force in Penang on 12 April 2007;

(ii) the SMA, which came into force in Penang on 12 June 2015. When the SMA came into force, the BCPA was repealed; and

(iii) the Strata Titles Act 1985 (STA), which came into force in Penang on 2 April 2010. It governs the subdivision of buildings or land into parcels or strata titles.

[27] I take note that P was formed at the first AGM on 14 October 2014, which was when the BCPA was in force, and before the SMA came into force. As such, the BCPA is applicable to this dispute, until the SMA comes into force. Then, the SMA became applicable to govern this dispute as well. The STA is also applicable.

The Agreed Issues To Be Tried

[28] The parties went to trial with four agreed issues to be tried. These initial agreed issues were:

(i) whether D1D2 are liable to pay maintenance charges into the building maintenance account and to pay sinking fund contributions into the sinking fund account?

(ii) whether accessory parcels A824(3) and A826(1) are common properties for P's benefit, and as such should be returned to P as common property?

(iii) which party is to manage the common properties delineated in yellow in the strata plan?

(iv) when does D1D2's obligation to rectify the fire protection services and electrical services end?

[29] Concerning Issue No. 1 – I was informed that the parties agreed that Issue No. 1 is the pivotal issue between the parties. If P wins this case, *ie*, Gurney Paragon has to maintain only one building maintenance account and one sinking fund account for the entire development (regardless of any distinction between the residential component and the commercial component), then D1D2 will be made liable to pay P the outstanding RM56.93 million, and P will possess and manage all the common property in Gurney Paragon.

[30] If, however, D1D2 wins, *ie*, Gurney Paragon is permitted to maintain separate building maintenance and sinking fund accounts between its residential component (which is managed by P) and its commercial component, then:

(i) D1D2 will not be liable to pay P the RM56.93 million claimed;

(ii) D1D2 (as the developer and owner of the commercial component) will continue to separately manage the commercial component; and

(iii) D3 does not have to account for or pay over their revenue from the car park and valet parking business to P.

[31] Concerning Issue No. 2 – the parties resolved the issue and agreed that it is no longer an issue to be tried. The parties agreed that there is no need for this issue to be determined by the court.

[32] Concerning Issue No. 3 – the parties inform me that "the common properties delineated in yellow" represent the commercial component's common property.

[33] If P wins, P will maintain and manage not only the residential component's common property (which it has been doing thus far), but also the common properties delineated in yellow, *ie*, the commercial component's common property, as it would be maintaining and managing all the common properties in the whole Gurney Paragon development.

[34] If, however, D1D2 wins, then D2 (as owner of the commercial component) will continue to maintain and manage its own common property. The commercial component's common properties will remain at *status quo*.

[35] Concerning Issue No. 4 – I am informed by the parties that after the fourth day of trial, the parties agreed to settle this issue. D1D2 agreed to perform the agreed rectification works. Issue No. 4 no longer needs to be determined by this court. More about this later.

[36] In the end, only Issues No. 1 and No. 3 are the issues to be tried and determined.

First Issue: Issue No. 1 – Whether D1 And D2 Are Liable To Pay Into The Building Maintenance Account And The Sinking Fund Account (For The Mall, The Office Tower And St Joseph's)?

P's Submissions

The Developer Must Pay Into The Building Maintenance Account And The Sinking Fund Account

[37] P submits that the answer to Issue No. 1 is yes. I propose to deal only with the more pertinent grounds. First – s. 17(1) of the BCPA provides that the developer, *ie*, D1 here (which also means the original owner of the land, *ie*, D2, according to s. 2 of the SMA), shall pay into the building maintenance account the maintenance and management charges of the common property in the development area, as well as the maintenance and management charges for "those parcels in the development area which have not been sold".

[38] Also, s. 18 of the BCPA provides that the developer shall "deposit" into the building maintenance account all the moneys received from the purchasers, for the purpose of maintenance and management.

[39] Additionally, s. 10(3)(b) of the SMA provides that the developer is to open one maintenance account for a development area.

[40] Further, s. 12(2) of the SMA provides that the developer is to pay the building maintenance account charges and contribute to the sinking fund account for "those parcels in the development area which have not been sold".

[41] D1D2 did not sell the commercial component, namely the mall, the office tower and the St Joseph's heritage structure. D2 remained the owner of the commercial component. As such, they constitute "parcels in the development area which have not been sold". P argues that D1D2 are therefore obligated to pay the building maintenance account charges and sinking fund account charges for the commercial component.

[42] The provisions cited above are set out below for reference (with my emphases in italic):

(i) BCPA

Section 17. Duties of developer as to Building Maintenance Account

(1) *A developer shall deposit into the Building Maintenance Account -*

(a) *all charges received by him from the purchasers* in the development area *for the maintenance and management of the common property of the development area;* and

(b) *all charges for the maintenance and management of the common property* to be paid by the developer *in respect of those parcels in the development area which have not been sold,* being a sum equivalent to the maintenance charges payable by the purchasers to the developer had the parcels been sold.

(ii) SMA

Section 18. Moneys to be deposited into Building Maintenance Account

The developer shall deposit all moneys received from the purchasers for the purpose of the maintenance and management of a building into the Building Maintenance Account within two working days of receiving the moneys.

(iii) SMA

Section 10. Developer to establish maintenance account

(3) *The developer shall deposit into the maintenance account -*

(a) *the Charges received by the developer from the purchasers* in the development area; and

(b) *the Charges to be paid by the developer in respect of those parcels in the development area which have not been sold,*

and all such moneys shall be deposited into the maintenance account within three working days of receiving the moneys.

(iv) SMA

Section 12. Purchaser and developer to pay charges, and contribution to sinking fund

(2) *The developer shall pay the Charges, and contribution to the sinking fund, in respect of those parcels in the development area which have not been sold,* being a sum equivalent to the Charges, and contribution to the sinking fund, payable by the purchasers to the developer had the parcels been sold.

The Parties Cannot Contract Out Of The Terms Of The BCPA And The SMA

[43] Second – ss. 44 and 45 of the BCPA, and ss. 148 and 149 of the SMA provide that parties cannot contract out of the statutory provisions. In other words, the provision of these statutes shall have effect even if there are terms to the contrary in the contract or agreement between the parties. Put differently, the terms of the statutes must be adhered to, and no contract or agreement between the parties will operate to annul, vary or exclude any provision of the statutes.

[44] These sections are set out below for reference (again, with my emphases in italic):

(i) BCPA

Section 44. Non-application of other written laws, contracts and deeds

> On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, *the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect* within the local authority area or that other area.

(ii) BCPA

Section 45. Contracting out prohibited

> (1) *The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement* entered into after the commencement of this Act.
>
> (2) *No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this Act shall operate to annul, vary or exclude any of the provisions of this Act.*

(iii) SMA

Section 148. Non-application of other written laws, contracts and deeds

> On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, *the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect* within the local authority area or that other area.

(iv) SMA

Section 149. Contracting out prohibited

> (1) *The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement* entered into after the commencement of this Act.
>
> (2) *No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this Act shall operate to annul, vary or exclude any of the provisions of this Act.*

[45] The sale and purchase agreements (SPA) between D1D2 and the purchasers of the residential parcels (the condominiums) provide that separate building maintenance accounts and sinking fund accounts will be kept by the residential component owners and the commercial component owners, namely D2. Further, the residential component owners shall keep their own sets of accounts and shall not concern themselves with nor question the commercial component's accounts.

[46] P argues that this term in the SPA is contrary to the BCPA and the SMA. The SPAs must be rendered null and void. In other words, the SPAs are of no effect and do not bind the parties.

One Development Area, One Building Maintenance Account And One Sinking Fund Account

[47] Third – ss. 2 and 16(1) and (2) of the BCPA, and ss. 2, 10(1) and 11(1) of the SMA provide that:

(i) a development area means "land held as one lot under final title"; and

(ii) the developer is to open one building maintenance account and one sinking fund account for each development area.

[48] These provisions are set out below for reference (with my emphases in italic):

(i) BCPA

Section 2. Interpretation

"development area" means any alienated land held as one lot under final title (whether Registry or Land Office title) on which building or land intended for subdivision into parcels is constructed or is in the course of construction;

(ii) BCPA

Section 16. Developer to open and maintain Building Maintenance Account

(1) *The developer* of any building or land intended for subdivision into parcels shall, before the delivery of vacant possession, *open*, in respect of the development area on which the building is erected, *a Building Maintenance Account in the name of the development area* with a bank or financial institution licensed under the Banking and Financial Institutions Act 1989 [Act 372] or regulated by the Central Bank under any other written law.

(2) *One Building Maintenance Account shall be opened for each development area.*

(iii) SMA

Section 2. Interpretation

"development area" -

(a) in relation to a building or land intended for subdivision into parcels, *means any land on which the building or land intended for subdivision into parcels is developed* or is in the course of development or intended to be developed; and

(b) in relation to a subdivided building or land, means *any alienated land held as one lot under final title* (whether Registry or Land Office title) on which the subdivided building or land is developed;

(iv) SMA

Section 10. Developer to establish maintenance account

(1) *A developer shall open one maintenance account in respect of each development area …*

Section 11. Developer to establish sinking fund account

(1) *A developer shall open one sinking fund account in respect of each development area …*

[49] P argues that there can only be one building maintenance account and one sinking fund account for one development area. Gurney Paragon is a development area. It is a land held as one lot under one title. It is a developed land, and intended to be subdivided into parcels. Having a separate building maintenance account and a separate sinking fund account for one type of development (residential component: condominiums) from another type of development (commercial component) – is wrong, and contrary to the applicable statutes.

The Resolutions Passed At The First AGM Are Invalid And Unenforceable

[50] Fourth – P argues that the resolutions passed at the first AGM, which resolved to have a separate building maintenance account and sinking fund account just for the residential component are invalid and unenforceable because they go against the provisions of the BCPA and the SMA.

[51] Putting P's argument in the context of Issue No. 1, P submits that if D1D2 can effectively cause the operation of a separate building maintenance account and sinking fund account for the residential component (condominiums), the commercial component owner, *ie*, D2, who owns the mall, the office tower and St Joseph's heritage structure, will not have to pay any charges for the maintenance and the sinking fund that relate to all the common properties in Gurney Paragon. P asserts that as it is the only joint management body that exists for Gurney Paragon, it is entitled to that money.

The COB's Administrative Decision Is Ultra Vires The BCPA And The SMA

[52] Fifth – P further argues that the COB's administrative decision dated 7 April 2017, that P is to maintain and manage only the residential component (condominiums); that P is to collect the building maintenance charges and the sinking fund contributions only from the condominium owners; and that the commercial component is to be maintained and managed by the commercial component owner – was made *ultra vires* the BCPA and the SMA *ie*, beyond the authority that was given to the COB, as the decision goes against the provisions of the statutes.

My Findings

[53] I comprehend and appreciate the arguments mounted by P. But on an analysis of case law authorities and the evidence, I am not in favour of P's arguments. My findings, and the reasonings that lead to my findings, are elaborated below.

Binding Case Law Authority

[54] A recent Court of Appeal case law authority guides me and binds me in my deliberation on the issues in this suit. The case is *Aikbee Timbers Sdn Bhd & Anor v. Yii Sing Chiu & Anor And Another Appeal* [2024] 3 CLJ 177; [2024] 1 MLJ 948; [2024] 1 AMR 997; [2024] 2 MLRA 196.

[55] The pertinent facts in *Aikbee* (*supra*) are these. The Pearl Suria project is a mixed development project, not unlike Gurney Paragon. It consists of residential condominiums, a shopping mall and a car park. The residential condominiums are owned by respective purchasers, including the respondent there: Yii Sing Chiu (YSC). The appellant there: Aikbee Timbers Sdn Bhd (Aikbee) was the developer of the project. It now owns the mall. Sit Seng & Sons Realty Sdn Bhd owns the car park.

[56] The residential condominium owners were previously required by Aikbee (as the developer) and presently by the management corporation (MC), to pay different (and higher) maintenance charges and sinking fund charges. Dissatisfied with this circumstance, YCS filed the subject suit to pose two questions of law to the High Court to determine.

[57] The principles that I gleaned from *Aikbee* (*supra*) which are pertinent to and binding on my decision here include:

(1) the SMA is a "social legislation". So is the Housing Development (Control And Licensing) Act 1966 (HDA) and the regulations made under the HDA: the Housing Development (Control and Licensing) Regulations 1989 (HDR). These statutes and regulations are "intended to achieve a common goal for the common good" of society – para. [51];

(2) in a mixed development, like in our suit, with different types of parcels – residential parcels and commercial parcels – the developer is entitled to impose different rates for the different types of parcels. The chargeable rate to maintain and manage common facilities which are for the exclusive "benefit and enjoyment" of the residential parcel owners, should not be the same as the rate chargeable for the commercial parcel owners, who do not have the right to use such exclusive facilities that are only for the residential parcel owners. The formula to determine the different chargeable rates must "represent a fair and justifiable proportion of the expenses for the maintenance and management of the common property". "The rigid imposition of only one chargeable rate

for maintenance charges for residential parcels and commercial parcels would not reflect the true construction of social legislation" – para. [53];

(3) in a mixed development, the developer is "entitled in law to impose different chargeable rates between the residential parcels and commercial parcels" for the maintenance charges and contribution to the sinking fund, "during the preliminary management period" – para. [58];

(3A) note: The preliminary management period is the period from the date of the delivery of vacant possession until one month after the first AGM of the MC. Section 46(2) provides that the preliminary management period includes the joint management body period. In our suit, the parties are still in this preliminary management period; and

(4) the determination of the rate for the maintenance charges and contribution to the sinking fund must be based on the principle of what is "just and reasonable" under the SMA and what is "fair and justifiable" under the HDA and the HDR, which govern the SPAs – para. [57].

[58] The *ratio decidendi* of *Aikbee* (*supra*), to me, is that the SMA and the HDA (that is to say the SPA in our suit) are to be interpreted by the courts as social legislation, which necessitates interpreting them to achieve a "just and reasonable" and a "fair and justifiable" outcome.

[59] Applying these principles, I am of the view that it is not "just and reasonable" nor is it "fair and justifiable" for P to charge D1D2 the same rates or charges that the residential parcel owners pay into P's building maintenance account and sinking fund account. My reasons are as follows.

The Legality Of The SPAs Is Not At Issue Here

[60] One – P is not a party to the SPAs, which were made between D1D2 and the purchasers. I find that P is not in a position to question the validity of the SPAs. The legality and enforceability of the SPAs are not an issue to be determined in this suit.

D1D2 Did Not Get To Use P's Common Facilities

[61] Two – D2, the commercial parcel owner did not (and does not) get to use the common facilities that are exclusive to the residential parcels such as the swimming pool and the gym. Nor does D2 get the benefit of the expenses incurred by P for the residential parcels, such as "general repair and maintenance", "landscaping" expenses, "lift maintenance", "swimming pool maintenance", "gymnasium maintenance", and "cleaning". The evidence is found in P's (the residential JMB's) management fund financial statements, and in the SPA's Sixth Schedule: Form of service charge statement (which provided for such expenses).

P Does Not Maintain And Manage The Common Property Of The Commercial Component

[62] Three – P does not pay any money towards (does not incur any expenses for) the maintenance and management of the common property of the commercial component. It is D2 who maintains and manages the common property of the commercial parcels.

[63] In cross-examination, P's second witness (PW2: Lawrence Wong) agreed (admitted) that P has not incurred any expenses for the maintenance and management of the commercial component's common property.

P Never Asked D1D2 To Vote On The Resolutions

[64] Four – D1D2 were never asked by P to vote on the resolutions passed at P's general meetings; on pertinent resolutions such as the resolutions on the rate chargeable for the maintenance and management of the common properties in Gurney Paragon.

[65] D2 is the commercial component (commercial parcel) owner, with voting rights.

[66] Paragraph 12(2)(c) of the Second Schedule of the SMA requires P, as the JMB, to notify each parcel owner about their voting rights and to inform them that they may vote at a general meeting. (The Second Schedule of the SMA applies to the MC, but s. 22(2) of the SMA provides that the Second Schedule equally applies to the JMB *ie*, P as well).

[67] The rate chargeable for the maintenance and management of the common property is resolved at general meetings.

[68] Section 22(2)(g) of the SMA provides that D2, as the owner of the unsold parcels in Gurney Paragon, has the same voting rights as any purchaser, exercisable in a general meeting. P's witness: PW2 (Lawrence Wong), in cross-examination, agreed to this effect of s. 22(2)(g) of the SMA.

[69] PW1: Ng Choong Wei, in cross-examination, admitted that D2, as the commercial parcel owner, did not get to vote on any of the resolutions passed at the first AGM. The evidence discloses that at the general meetings, D2, as commercial parcel owner – was not invited to attend and vote at the general meetings.

[70] When D1D2 attended the general meetings, it was as the developer's representatives, not as the commercial parcel owner. As developer's representatives, they were not given, any voting rights. This is borne out in DW2: Tan Siew Feng's testimony in re-examination.

D1D2 Did Not Procure The Passing Of The Resolutions Passed At The First AGM

[71] Five – at the first AGM, it was not D2, as the commercial parcel owner, who caused, or was responsible for, the passing of the resolutions passed at the first AGM. D2 did not attend the first AGM as the commercial

parcel owner. D2 did not vote, as the commercial parcel owner, to pass the resolutions. It was only the residential parcel owners who voted and passed the resolutions at the first AGM. And so the residential parcel owners, and P, are bound by the resolutions.

The Resolutions Of The First AGM Were Not Invalidated In Subsequent General Meetings

[72] Six – the first AGM resolutions were affirmed at the second AGM. And no subsequent resolutions passed at subsequent AGMs invalidated the first AGM resolutions. The first AGM resolutions were neither superseded nor varied.

[73] P accepted the terms of the resolutions and acted on them, since its formation in October 2014.

The Budgets Presented By P At General Meetings Were Only For Expenses For The Residential Component

[74] Seven – in the AGMs after the first AGM, the budgets presented by P (the JMB) disclose expenses solely for the residential component (condominiums). There was no budget for any provision to maintain and manage the commercial component.

[75] This fact demonstrated, and I so find, that P has not only accepted, but in fact indorsed (supported) the separation of the building maintenance and sinking fund accounts into the residential component and the commercial component.

P's Treatment Of Its Invoices Is Inconsistent With Its Claim

[76] Eight – P's expenses, disclosed in its audited accounts, were limited only to the residential parcels. P's audited accounts do not disclose any expenses for the commercial component.

[77] Again, PW2: Lawrence Wong, in cross-examination, agreed (admitted) that P has not incurred any expenses to maintain and manage the commercial component.

[78] Further, P's invoices that support its claim against D1D2 amount to RM56.93 million. But the values of these invoices were not disclosed as contingent assets in its audited accounts, neither as a lump sum nor cumulatively over time.

The COB's Decision Was Valid And Binding

[79] Nine – P argues that the COB's decision was not an administrative decision, but a clarification or an opinion given by the COB.

[80] I find that this argument is untenable. The COB: Nik Ariff bin Long Dir testified at the trial. He was DW1. In cross-examination, he verified that his letter of 7 April 2017 was in fact a decision.

[81] Section 16(5) of the BCPA provides that the COB is empowered to resolve disputes about the building maintenance account, "as he deems fit and just". A

[82] The COB decided (by his letter dated 7 April 2017) that:

(i) the maintenance of the condominiums (residential parcels) is separate from the commercial parcels; and B

(ii) P (the JMB) is to collect maintenance charges for the residential parcels only; the commercial parcels are to be maintained and managed by their owner, namely D2.

[83] In re-examination, the COB testified that his decision was based on the resolutions, as the resolutions were unanimously passed. The resolutions provided that the management, collection and expenditure of the residential component, which necessarily include the building maintenance account money – are to be separate from the commercial component. C

[84] In cross-examination, PW1: Ng Choong Wei agreed that the COB affirmed that the collection of maintenance charges for the condominiums would only be made from the residential parcel owners. The COB affirms that P (the JMB) will manage only the residential component. D

[85] In cross-examination, PW2; Lawrence Wong agreed that the COB's decision clarified that there is to be a separation of the residential component maintenance and management accounts and the commercial component's maintenance and management accounts. E

[86] The COB's decision was not appealed against. The COB's decision was not set aside in court proceedings. Nor did P pursue judicial review proceedings against the decision. F

[87] As the BCPA empowered the COB to resolve disputes about the building maintenance account, and his decision was not set aside, I am compelled to find that the COB's decision is binding on P (the JMB). G

The One Development-one Account Argument Does Not Bring About A Just Outcome

[88] Ten – I find that P's one development-one account argument does not result in a just outcome. Gurney Paragon is a mixed development. For the one development-one account argument – which necessarily means that there can only be one chargeable rate – to be "just and reasonable" in relation to the SMA, and "fair and justifiable" in relation to the SPAs between D1D2 and the purchasers, these three things must take place: H

(i) the general meetings – where P asserts that decisions relating to the whole Gurney Paragon development were made – must be attended by all parcel owners (residential and commercial), so that they can all vote on the resolutions, which constitute binding decisions; I

(ii) if all parcel owners (residential and commercial) are not given the right to vote, the general meeting would have no power to decide on the one rate chargeable for all parcels: residential and commercial; and

(iii) also, the AGMs would not have been in compliance with the SMA, and the decisions made at the AGMs would be rendered void.

[89] I considered the following case law authorities. The principle that I gleaned from them is that only the JMB (not the Joint Management Committee (JMC), or the Strata Management Tribunal) is entitled to determine the maintenance and management rate chargeable. I refer to these case law authorities and summarise the principles propounded:

(i) *Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor* [2019] 10 CLJ 547; [2020] 3 MLJ 645; [2019] 7 AMR; [2020] 4 MLRA 288 – the JMC is not empowered to decide on the rates, only the JMB can decide on the rates at an AGM. The JMB cannot delegate that duty and power to the JMC (where only a few committee members make decisions that affect all the parcel owners);

(ii) *Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation* [2019] 2 CLJ 592; [2018] 4 MLJ 284; [2018] 3 MLRA 342; [2018] AMEJ 0250 – the rate chargeable must be determined by a general meeting;

(iii) decision dated 14 December 2022 of the Penang High Court: *Tropicana Macalister Avenue (Penang) Sdn Bhd v. Badan Pengurusan Bersama Tropicana 218 Macalister* [2022] CLJU 2945; [2022] 1 LNS 2945; [2023] 2 AMR 521; [2022] MLJU 3275; [2022] MLRHU 2705 – per Justice Quay Chew Soon, at para. [43] – the determination of the amount of maintenance charges cannot be delegated to the JMC. He followed *Ekuiti Setegap* (*supra*);

(iv) another decision dated 13 July 2023 of the Penang High Court: *Tropicana Macalister Avenue (Penang) Sdn Bhd v. Badan Pengurusan Bersama Tropicana 218 Macalister* [2023] CLJU 1554; [2023] 1 LNS 1554; [2023] 7 AMR 407; [2023] MLJU 1728; [2023] MLRHU 1340 – per Justice Quay Chew Soon, at para. [26] – the determination of rates chargeable for maintenance and contribution to the sinking fund can only be determined at a general meeting of the JMB. It must be a collective decision. The decision cannot be delegated to any other party *eg*, JMC. And at paras. [31] and [32] – since there is no legitimate rate determined at the general meeting of the JMB, there is no default of payment and there is no outstanding sum due and payable; and

(v) the Court of Appeal (CA) decision dated 6 October 2023: *Badan Pengurusan Bersama Tropicana 218 Macalister v. Tropicana Macalister Avenue (Penang) Sdn Bhd* [2023] CLJUO 17; [2023] 1 LNSO 17 – on appeal, the CA upheld Justice Quay's decision. The CA agrees with the CA

decision in *Rajawali* (*supra*) concerning the JMB's power to determine the maintenance charges. The JMC does not have that power. It could not have been the intention of the SMA that four minority parcel owners' representatives sitting in the JMC could outvote the two representatives who represent the majority of the share units. The outcome would clearly have been different if the decision had been taken at the AGM of the JMB where the voting rights attached to the majority share units would have prevailed.

[90] In our suit, the residential parcel owners only make up approximately 24.4% of the entire Gurney Paragon development. The AGMs held by P (the JMB) consisted of a minority of the share unit owners in Gurney Paragon. If D2 (who is the majority share unit owner, at 75.6% of Gurney Paragon) were to be allowed to vote, the decision on the chargeable rate would have been significantly different.

[91] I find that the effect of these principles is that – no valid AGM was held by P (the JMB), because D2, as the commercial parcel owner, was not given the right to attend the AGMs as a parcel owner, with a right to vote. To determine a valid chargeable rate, a general meeting with all the parcel owners in attendance, including D2, must be held. Until a valid rate is determined, no charges are due and owing from D1D2.

[92] This reasoning is reinforced in *Tropicana Macalister* (*supra*), the decision dated 13 July 2023 – D1D2's right to vote is a fundamental right under statute – paras. [35] and [36].

Conclusion On Issue No. 1

[93] I therefore find that it is not "just and reasonable" and not "fair and justifiable" for P (the JMB) to impose maintenance charges and sinking fund contributions which apply only to the residential parcels, and are determined only by the residential parcel owners through the JMB – on D1D2.

[94] On Issue No. 1, I hold that D1D2 are not liable to pay into the building maintenance account and the sinking fund account. In other words, D1D2 are not liable to pay P the RM56.93 million claimed.

Second Issue: Issue No. 3 – Which Party Should Be Managing The Common Properties Delianeated In Yellow In The Strata Plan?

[95] On Issue No. 3 – I find that D2 (as the commercial component owner) is to continue to maintain and manage its own commercial component common property. In other words, the maintenance and management of the commercial component's common property are to remain at *status quo.*

[96] In P's re-amended statement of claim, Prayer 66(ca) is for an order that D1D2 "do forthwith deliver and surrender all common property as delineated in the strata plan submitted by (D1D2) to [P]". I accordingly dismiss Prayer 66(ca).

Conclusion

[97] P (the JMB) filed this suit to seek a judgment that D1D2 are liable to pay the JMB the arrears of years of maintenance charges and sinking fund contributions amounting to over RM56.93 million. The RM56.93 million, if ordered against D1D2, would be a windfall for P in the sense that they have spent no money to maintain and manage the common property of the commercial parcels. They have never considered the wishes of the commercial parcel owner (D2) by inviting D2, as a parcel owner, to the JMB's AGMs and allowing D2 to vote on the resolutions tabled.

[98] I am guided and bound to interpret the BCPA and the SMA as social legislations which are not rigid but flexible, to bring about what is "just and reasonable" and "fair and justifiable". This compels me to allow separate maintenance and sinking fund accounts for the residential component as against the commercial component. And as resolved at the first AGM and decided by the COBI permit P (the JMB) to maintain and manage the residential component's common property for the residential parcel owners, and let D1D2 maintain and manage the commercial component's common property for D2: the commercial parcel owner.

[99] An alternative judgment, as suggested by D1D2D3, is to start over and rectify what was not done according to the SMA, and determine one uniform rate for all parcel owners, based on share units, and have one maintenance account and sinking fund account. In other words, P (the JMB) is to hold a general meeting where all parcel owners – residential and commercial – attend and vote to determine the chargeable rate that will bind every parcel owner. The residential parcel owners have 24.4% share units and the commercial parcel owner has 75.6% share units. Allow the resolution or decision to be made based on these share unit proportions.

[100] With that circumstance in mind, I find that it is very likely that such an alternative judgment will bring about even more disputes between P (the JMB) and D1D2 (developer and commercial parcel owner) – which is not a desired outcome at all. I therefore decline to make this alternative judgment.

Judgment/Orders

[101] P's prayers are to get the payment of the RM56.93 million, and to take possession of, and maintain and manage, the commercial component's common property as well, even to the extent that the commercial parcel owner cannot use the commercial component's common property without P's approval (refer to Prayer 66(m)).

[102] P has 33 prayers for relief and remedies against D1D2D3. I dismiss P's claim against D1D2D3, and make the following orders:

(i) I dismiss Prayers 66(a) to (ca);

(ii) prayers 66(cb) to (t) were withdrawn by P;

(iii) I dismiss Prayers 66(u) to (y);

(iv) I make no orders on Prayers 66(ya), (yb) and (yc), because of the consent order of 8 April 2022;

(v) P withdrew Prayers 66(yd) and (ye);

(vi) I make no order on Prayer 66(yf); and

(vii) with costs of RM200K to be paid by P to D1D2D3 by 27 September 2024. Costs are subject to the allocatur.

[103] As for P's claim against D4 – P's claim against D4 relates to the strata plan. The first day of trial was on 8 October 2020. D4 approved the strata plans on 10 September 2020. And the strata plans were served on P on 24 September 2020 – before the trial commenced. In other words, P no longer had a claim for relief or remedy against D4 when the trial started.

[104] At the post-trial oral submissions on 17 April 2024, the counsel for D4 pointed out that P could have and should have withdrawn this suit against D4 before the trial started, or soon after the trial started. But only when counsel for D4 raised this issue did P then withdraw the claim against D4.

[105] As the claim against D4 was withdrawn so late in the proceedings, D4 asks for substantial costs against P. D4 submits that P made D4 sit through the six days of trial; examining the witnesses; filing several sets of written submissions; participating in several oral submissions sessions; and generally continuing to defend against P's claim, until right before the delivery of judgment.

[106] P withdrew Prayers 66(z) and (aa) against D4.

[107] I order P to pay costs of RM80K to D4 by 27 September 2024. This RM80K costs is not subject to the allocatur.